

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 February 2004

CASE NO.: 2003-BLA-5068

In the Matter of:

MITCHELL L. WHITT
Claimant

v.

NATIONAL MINES CORPORATION
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

APPEARANCES:

Otis R. Mann, Jr., Esq.
For the Claimant

No appearance
For the Employer

Before: DANIEL L. LELAND
Administrative Law Judge

DECISION AND ORDER -AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Beckley, West Virginia on December 3, 2003 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-30 and claimant's exhibits (CX) 1-3 were admitted into evidence. On May 14, 2003, employer's counsel, Henry C. Bowen, Esq., submitted a report of Dr. George Zaldivar to Judge Richard A. Morgan, the judge who was previously assigned the case. The hearing before Judge Morgan was continued and Mr. Bowen later withdrew as employer's counsel. Although Dr. Zaldivar's report was not formally introduced at the hearing, as it was previously submitted to a prior judge in this case, it will be marked employer's exhibit (EX) 1 and made part of the record.

ISSUES

- I. Existence of pneumoconiosis
- II. Causal relationship of pneumoconiosis and coal mine employment.
- II. Existence of total disability.
- IV. Causation of total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ¹

Procedural History

Mitchell L. Whitt (claimant or miner) filed the present claim for benefits on March 13, 2001 and was awarded benefits by the district director on July 24, 2002. (DX 2, DX 22) After the employer requested a hearing the case was referred to the Office of Administrative Law Judges on October 16, 2002. (DX 28)

Background

The miner was born on July 21, 1942 and his wife, Norma is his sole dependent. (DX 2, DX 9) Claimant's Social Security records verify that he was employed as a coal miner for twenty six years ending in 1992. (DX 6) See also DX 3. Claimant is presently employed by Phillips Machine Shop in an office job that is primarily sedentary in nature. (TR 9) His last coal mine job was operating the thermal dryer in the preparation plant. (TR 10) In that job he walked up and down six flights of stairs, performed maintenance on the dryer, and shoveled spillage from a 150 foot coal belt. (TR 10-11) Some of the maintenance required heavy lifting. (TR 11) Claimant was short of breath while working in the coal mines and his shortness of breath has grown worse. (TR 13-14) Claimant smoked cigarettes from age twenty to age forty. (TR 16) Claimant's present job requires less exertion than his coal mine work and pays about half the salary. (TR 17-19)

¹ The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, EX=employer's exhibit, TR=transcript of hearing, BCR=board certified radiologist, B=B reader.

Medical Evidence

Chest x-rays

<u>Exhibit</u>	<u>Date</u>	<u>Physician</u>	<u>Interpretation</u>
DX 16	10/30/01	Patel, BCR, B	1/1, u/t
DX 17	10/30/01	Binns, BCR, B	quality 2
CX 3	10/30/01	Pathak, BCR, B	1/2, q/r
EX 1	10/16/02	Zaldivar, B	negative for pneumoconiosis
CX 1	6/19/03	Gaziano, B	1/2, r/t
CX 2	6/19/03	Aycoth, B	2/2, p/r

Pulmonary Function Studies

<u>Exhibit</u>	<u>Date</u>	<u>Height</u>	<u>Age</u>	<u>FEV1</u>	<u>FVC</u>	<u>MVV</u>
DX 14	10/30/01	68 in.	59	1.64	3.71	62
				1.94*	3.99*	85*
EX 1	10/6/02	67 in.	60	1.70	4.07	---
				1.99*	4.26*	---
CX 1	6/19/03	68 in.	60	1.79	3.96	56

*post bronchodilator

Dr. Gaziano determined that the October 30, 2001 studies are acceptable. DX 15.

Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>PCO2</u>	<u>PO2</u>
DX 13	10/30/01	39	83
		41*	61*
EX 1	10/16/02	37	88
		41*	72*
CX 1	6/19/03	38	91
		42*	70*

*exercise values

Medical Reports

On October 31, 1985, the West Virginia Occupational Pneumoconiosis Board determined that claimant has occupational pneumoconiosis and a 30% pulmonary function impairment. (DX 8)

Dr. D. L. Rasmussen examined claimant on October 30, 2001. (DX 12) Dr. Rasmussen recorded that claimant was currently smoking one or two cigarettes a day and previously smoked

one pack a day from 1960 to 1971 and that he starting smoking again in 1991. In the physical examination, claimant's breath sounds were minimally reduced and there were no rales, rhonchi, or wheezes. The chest x-ray was classified as 1/1 by Dr. Patel. Pulmonary function studies demonstrated a moderately severe partially reversible obstructive impairment with a minimally reduced diffusing capacity, and the blood gases were normal at rest but showed minimal hypoxia with exercise. Dr. Rasmussen concluded that claimant does not retain the pulmonary capacity to perform his regular coal mine job and that his coal mine dust exposure is a major contributing factor to his disabling lung disease.

Dr. Zaldivar's examination of claimant took place on October 16, 2002. (EX 1) Dr. Zaldivar recorded that claimant had smoked one pack of cigarettes daily from age twenty to age forty and then smoked four or five cigarettes a day from five years ago until six months ago when he quit. In the pulmonary examination, claimant's lungs were clear to auscultation and percussion with no wheezes, crackles, or rales. Dr. Zaldivar read claimant's chest x-ray as negative for pneumoconiosis. The pulmonary function studies showed moderate reversible airway obstruction with mild air trapping, and the blood gas test was normal. Dr. Zaldivar diagnosed asthma based on the reversibility of the pulmonary function studies, the normal diffusing capacity, and the increase in the pCO₂ during exercise. He recommended the use of bronchodilators. He stated that claimant is capable of performing his usual coal mine work as a dryer operator as all he did in that job was take care of the dryer and do occasional shoveling. Dr. Zaldivar averred that claimant does not have coal workers' pneumoconiosis.

Claimant was evaluated by Dr. D. Gaziano on January 23, 2003. (CX 1) Dr. Gaziano noted the miner's occupational history and that he had smoked one pack of cigarettes a day from 1970 to 1990. He read claimant's chest x-ray as 1/2, interpreted the spirometry as showing a severe obstructive impairment, and noted that the exercise blood gases demonstrated a decrease in arterial oxygen tension. Dr. Gaziano stated that claimant has coal workers' pneumoconiosis with a moderately severe degree of pulmonary impairment that would preclude him from resuming his prior coal mine employment.

Conclusions of Law

Benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W. G. Moore & Sons, Inc.*, 9 BLR 1-4 (1986). A finding of the existence of pneumoconiosis may be made based on chest x-rays, autopsies or biopsies, the presumptions in §§ 718.304, 718.305, or 718.306, and the reasoned medical opinion of a physician that the miner has pneumoconiosis as defined in § 718.201.² § 718.202(a)(1)-(4). All types of relevant evidence must be weighed to determine if the miner has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F. 3d 22 (3d Cir.1997), *Island Creek Coal Co. v. Compton*, 211 F. 3d 203 (4th Cir., 2000).

² Pneumoconiosis is defined as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, and it includes both medical, or clinical, pneumoconiosis and statutory, or legal pneumoconiosis.

Four of the five x-ray readings in the record are positive for pneumoconiosis. (Dr. Binns' reading was for quality only). The positive readings were by Drs. Patel and Pathak, board certified radiologists and B readers, and Drs. Aycoth and Gaziano, B readers. Dr. Zaldivar, a B reader, made the only negative interpretation. I find that the x-ray evidence is positive for pneumoconiosis.

There is no biopsy or autopsy evidence in the record and claimant is not eligible for the enumerated presumptions.

Dr. Rasmussen and Dr. Gaziano diagnosed pneumoconiosis in part based on positive x-ray interpretations. Dr. Zaldivar stated that claimant does not have pneumoconiosis but he relied on his own negative x-ray reading which is against the weight of the x-ray evidence. He was the only physician to diagnose asthma and I do not credit his opinion. I accord more weight to the opinions of Dr. Rasmussen and Dr. Gaziano because they are consistent with the preponderance of the x-ray interpretations. Based on all the evidence, I find that the miner has pneumoconiosis.

As claimant had twenty six years of coal mine employment, he is entitled to the presumption that his pneumoconiosis arose out of coal mine employment. § 718.203(b). There is no evidence of record rebutting this presumption.

A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. § 718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability shall be established by pulmonary function studies showing the values equal to or less than those in Appendix B, blood gas studies showing the values in Appendix C, the existence of cor pulmonale with right sided congestive heart failure, or the reasoned and documented opinion of a physician finding that the miner's pulmonary or respiratory impairment prevents him from engaging in his usual coal mine work and comparable and gainful work § 718.204(b)(2).

All three pulmonary function studies produced qualifying values before bronchodilators. The two post bronchodilator studies are nonqualifying. None of the blood gas tests is qualifying and there is no evidence that the miner has cor pulmonale. Dr. Rasmussen and Dr. Gaziano found that claimant's pulmonary impairment prevents him from performing his usual coal mine work as a thermal dryer operator. Their opinions are well reasoned as they are based on the abnormal pulmonary function and blood gas study results. Dr. Zaldivar concluded that claimant is capable of doing the work of a thermal dryer operator but he stated that all claimant did in this job was take care of the dryer and occasionally shovel coal. Claimant's testimony indicates that he frequently climbed six flights of stairs in the preparation plant, did heavy lifting, and shoveled coal on more than an occasional basis. As Dr. Zaldivar misstated the exertional requirements of claimant's usual coal mine work, I give little weight to his opinion. Based on all the evidence, I conclude that claimant is totally disabled from doing his usual coal mine work. Although claimant is presently employed, his current job is both physically less demanding and lower paying than his prior coal mine work and does not constitute comparable and gainful work.

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's total disability if it: (i) Has a material adverse effect on his respiratory or pulmonary impairment; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1).

Dr. Rasmussen and Dr. Gaziano persuasively concluded that the miner's pneumoconiosis is a significant factor in his pulmonary disability. Dr. Zaldivar attributed claimant's pulmonary impairment to asthma but as he did not diagnose pneumoconiosis, his opinion on etiology is entitled to little weight. *See Scott v. Mason Coal Co.*, 289 F. 3d 263 (4th Cir. 2002). After weighing the medical opinions, I find that the miner is totally disabled due to pneumoconiosis.

The evidence establishes all the elements of entitlement. As the evidence does not clearly establish an onset date of total disability due to pneumoconiosis, benefits will be awarded as of March 1, 2001, the first day of the month in which the claim was filed. See § 725.503(b). Claimant's counsel has thirty days to file a fully supported fee application and his attention is directed to §§ 725.365 and 725.366. The employer has twenty days to respond with objections.

ORDER

IT IS ORDERED THAT National Mines Corporation:

- (1) Pay claimant all the benefits to which he is entitled, augmented by one dependent, beginning as of March 1, 2001;
- (2) Pay claimant all the medical benefits to which he is entitled beginning as of March 1, 2001;
- (3) Reimburse the Black Lung Disability Trust Fund for interim payments made to claimant; and,
- (4) Pay interest to the Black Lung Disability Trust Fund on interim payments made to claimant. See § 725.608.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this Decision and Order was filed in the office of the district director, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210

